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18 **UNITED STATES DISTRICT COURT**
19 **DISTRICT OF ARIZONA**

20 SolarCity Corporation,

21 Plaintiff,

22 vs.

23 Salt River Project Agricultural
24 Improvement and Power District; Salt
25 River Valley Water Users' Association,

26 Defendants.

No. 2:15-CV-00374-DLR

**DEFENDANT SALT RIVER
PROJECT AGRICULTURAL
IMPROVEMENT AND POWER
DISTRICT'S NOTICE OF ISSUES
FOR TELEPHONIC STATUS
CONFERENCE**

1 Pursuant to Rule 16 Defendant (“the District”) submits this notice of issues to
2 discuss at a telephonic status conference scheduled for 9:30 am on Friday, July 24, 2016.
3 Counsel have conferred regarding the issues below and have been unable to reach
4 agreement. For the Court’s reference, a transcript of the last scheduling conference is
5 attached as **Exhibit A**.

6 **The classification for purposes of Rule 26(a)(2) of third-party consultants**
7 **retained by the District’s management or board during the 2014-2015 pricing**
8 **process prior to the litigation.** The deadline for the District’s expert disclosures is July

9 1. The parties have been unable to reach agreement on the extent of expert discovery or
10 permissible trial testimony with regard to third-party consultants (the “Public Process
11 Consultants”) retained by the District’s management or board during the 2014-15 pricing
12 process. The District intends to call two of the consultants to testify as Rule 26 experts,
13 including with regard to the reports and testimony they provided from December 2014 to
14 February 2015. The parties seek the Court’s guidance as to the permissible scope of
15 testimony from the others.

16 **The District’s Position.** The District believes that the Public Process Consultants
17 should be permitted to testify to their role in the pricing process, including the work they
18 performed and the opinions they provided to the District’s board during that process.
19 While the District intends to offer independent expert opinion testimony in this litigation,
20 it submits that the Public Process Consultants’ roles in the pricing process—including
21 their opinions at that time—have independent factual relevance. As such, in May 2015,
22 the District included the Public Process Consultants from whom the District intended to
23 offer testimony in its initial disclosures; the consultants produced documents in response
24 to SolarCity subpoenas; and their prior reports and testimony were provided to SolarCity.

25 **SolarCity’s Position.** SolarCity contends that, if the Public Process Consultants
26 are trial witnesses and the evidence extends beyond the facts (1) that they were retained
27 and (2) that they submitted reports that were made available, then SolarCity is entitled to
28 expert discovery concerning the consultants, including the opportunity for SolarCity’s

1 experts to offer rebuttal opinions and for SolarCity to depose the consultants during the
2 expert phase. To the extent that SRP intends to introduce any opinion by any expert
3 retained by SRP, whether that expert expressed that opinion in the pricing process or not,
4 SolarCity is entitled to timely disclosure of that expert, his or her conclusions, the
5 material relied upon or considered in forming the opinion, and a deposition relating to
6 that opinion during the expert phase.

7 **The effect of the District's pending Ninth Circuit appeal on the issues before**
8 **this Court.** The Ninth Circuit ordered that the District's appeal regarding the state action
9 doctrine, immunity under A.R.S. §12-820.01(A), and the filed rate doctrine be expedited,
10 and SolarCity's contention that the Ninth Circuit lacks jurisdiction has been deferred to
11 the merits panel. Merits briefing was completed on June 20, 2016, and the Ninth Circuit
12 has not yet scheduled oral argument.

13 **The District's Position.** The issues on appeal include the state action doctrine,
14 absolute immunity from damages under A.R.S. §12-820.01(A), and the filed rate
15 doctrine. The District believes that a stay of litigation in this Court following the
16 completion of expert discovery (scheduled for August 15) should be discussed and may
17 be warranted because a decision by the Ninth Circuit on the merits will significantly
18 affect the remainder of the case, including the issues on summary judgment. The District
19 acknowledges that, in December 2015, this Court denied the District's prior motion to
20 stay the litigation in its entirety, but the Court also stated that it "must wait for the Ninth
21 Circuit's determination before proceeding" on the District's state action and Title 12
22 immunity defenses (Dkt. 102 at 10:9-13). The District intends to move for summary
23 judgment on these defenses and other grounds and seeks the Court's views on the
24 appropriate time to do so.

25 **SolarCity's Position.** SolarCity contends that SRP's appeal provides no reason to
26 delay or defer any aspect of the case. Nothing has changed since this Court declined the
27 District's request for a stay: The Court is free to "continue with other phases of the case"
28 (Dkt. 102 at 10) so long as it does not alter its decisions on the Arizona statutory issue or

1 the state-action doctrine. SRP contends on appeal that the issues it now cites are
2 “completely separate from the merits,” which means SRP cannot argue that trial on the
3 merits raises any jurisdictional issue. Moreover, the Arizona statutory issue is moot
4 because it applies only to damages (and SolarCity does not seek damages at the
5 upcoming trial), and SolarCity’s trial presentation will be the same regardless whether the
6 state-action doctrine is at issue because the same facts relevant to the state-action doctrine
7 are relevant to the antitrust merits issues of incentives and intent. In sum, the trial
8 presentation will remain the same no matter the appellate outcome and, in light of the
9 ongoing harm caused by SRP’s conduct, the case should proceed as scheduled with the
10 potential minor modification discussed below.

11 **How the case should proceed with respect to any dispositive motions and**
12 **trial.**

13 The District’s Position. The District submits that, in the event the Court declines
14 to stay the litigation, the current schedule (see Appendix) does not provide a meaningful
15 opportunity for the parties to brief—and the Court to rule upon—the District’s expected
16 motion for summary judgment prior to the deadlines for pretrial submissions and trial.
17 The District believes the extensive factual record, scope of expert testimony, and the
18 complexity of the issues in the case warrant an adjustment of the schedule and page limits
19 for summary judgment briefing.

20 SolarCity’s Position. SolarCity believes that the current schedule is both adequate
21 to accomplish what needs to be accomplished before trial and necessary to address the
22 ongoing harm that SRP has caused by effectively shutting down new solar installations in
23 its territory. The only potential exception is that, depending on the resolution of the
24 expert issues above, an additional 1-2 weeks for expert rebuttal reports and expert
25 depositions may be needed. This is because of the uncertainty of the number of experts
26 the District intends to call. SolarCity opposes any other change to the schedule or
27 briefing requirements.

RESPECTFULLY SUBMITTED this 23rd day of June, 2016.

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APPENDIX: CURRENT SCHEDULE

For the Court's convenience, the District sets forth the current schedule, which follows from the Court's November 24, 2015 Minute Order (Dkt. 87), Scheduling Order (Dkt. 89), and Order Setting Final Pretrial Conference (Dkt. 91), in conjunction with the Federal and Local Rules of Civil Procedure and a stipulation by the parties (Dkts. 132, 134):

- **May 15, 2016** – Deadline for Completion of Fact Discovery (Dkt. 89)
- **June 1, 2016** – Deadline for Plaintiffs' Expert Disclosures (Dkt. 89)
- **July 1, 2016** – Deadline for Defendants' Expert Disclosures (Dkt. 89)
- **July 15, 2016** – Deadline for Rebuttal Expert Disclosures (Dkt. 89)
- **August 1, 2016** – Deadline for Additional Rule 26(a)(3) Disclosures (Dkt. 134)
- **August 15, 2016** – Deadline for Expert Depositions (Dkt. 89)
- **August 15, 2016** – Deadline for Objections to Rule 26(a)(3) Disclosures (Dkt. 134)
- **September 1, 2016** – Deadline for Dispositive Motions (Dkt. 89)
- **September 15, 2016** – Deadline for Engaging in Settlement Talks (Dkt. 89)
- **October 6, 2016** – Deadline for Oppositions to Motions to Summary Judgment (Local Rule 56.1(d), Fed. R. Civ. P. 6(a)(1)(C),(d)).
- **October 13, 2016** – Deadline for Parties to Exchange Drafts of Joint Final Pretrial Statement, Meet in Person, and Exchange Marked Exhibits (Dkt. 91)
- **October 24, 2016** – Deadline for Replies in Support of Motions for Summary Judgment (Local Rule 56.1(d), Fed. R. Civ. P. 6(a)(1)(C),(d))
- **October 27, 2016** – Deadline for Parties to Submit Joint Proposed Final Pretrial Order and to Each Lodge Proposed Findings of Fact and Conclusions of Law (Dkt. 91)
- **November 1, 2016** – Final Pretrial Conference (Dkt. 91)
- **November 7, 2016** – Earliest Date for Oral Argument on Any Dispositive Motion (Local Rule 56.1)
- **November 8-18, 2016** – Bench Trial (Dkt. 87)

CERTIFICATE OF SERVICE

I hereby certify that on June 23rd, 2016, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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